IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE.

FIRST APPEAL NO. 1151 OF 2005

Shri Mohammed Amin Imauddin Shaikh ... Appellant.

Vs.

Shri Gaus Mohiddin Shaikh. ... Respondent.

.....

Shri S. R. Borulkar for the Appellant.
Shri A. A. Garge for the respondent.

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CORAM : V.C. DAGA, J.

DATED : 20.4.2006

P.C. :

This first appeal filed under section 96 of the Code of Civil Procedure, 1908 (CPC) is being disposed of at the stage of admission after receipt of R & P from the Court below.

2. Heard rival parties. Perused R & P containing rival pleadings, evidence (documentary and oral) and findings recorded by the Court below.

3. This appeal is directed against the judgment and

decree dated 25.5.2004 passed in Special Civil Suit No. 84 of 1999 by the Civil Judge, Senior Division, Kalyan, decreeing suit for possession; damages and injunction with enquiry for mesne profits under O. 20 Rule 12 of C.P.C.

Background Facts :

4. The appellant is original defendant; whereas respondent is original plaintiff. However, for the sake of clarity parties are hereinafter referred to in their original capacity as they were referred in the trial Court.

5. The plaintiff, prior to filing of the suit, had issued under Section 106 of the Transfer of Property Act; registered notice dated 30.11.1998 (Ex.41) to the defendant alleging arrears of rent, default in payment of rent; nuisance and acquisition of alternative accommodation and called upon him to quit from the tenanted premises (suit premises).

6. The defendant by his reply dated 11.1.1999 denied the contents of the above notice. He denied to be the tenant of the

premises. He alleged that he is occupying the suit premises as a prospective purchaser of the premises in his own rights; since he has paid full consideration for the purchase of the premises admeasuring 1700 sq. ft.; for total amount of Rs. 5,50,000/-. He, himself claimed to be a lawful owner of the suit premises. That he is staying in the suit premises with his family w.e.f. 14.5.1996. It was specifically asserted that he, not being a tenant of the suit premises, the question of payment of rent or arrears thereof or he becoming defaulter or creating nuisance for landlord or others did not arise.

7. The plaintiff, after receipt of the above reply, vide his Advocate's letter-cum-notice dated 1.3.1999 denied right of the defendant to occupy the suit premises as a prospective purchaser of the suit premises. He also denied the transaction alleged by the defendant. The defendant was informed by the plaintiff that he has forfeited his right of tenancy in view of his denial of the title and that he shall never be entitled to claim right of tenancy in future.

8. On the above backdrop, plaintiff filed a title suit for

possession, damages and injunction (Ex. 1) treating defendant as a trespasser in the suit premises being Special Civil Suit No. 84/1999; in the Court of Civil Judge, SD, Kalyan.

9. On being noticed, defendant appeared through Advocate and filed his written statement (Ex,. 24) reiterating very stand taken by him in his reply dated 11.1.1999. He did not claim to be a tenant of the suit premises. No counter claim was preferred by the defendant in the written statement to seek specific performance of the alleged contract referred to in his reply dated 11.1.1999.

The trial Court framed issues relevant to the rival pleadings.

The parties to the suit were permitted to lead their evidence by way of affidavit.

10. Plaintiff filed his affidavit (Ex.30) in lieu of his evidence on 28.1.2003 in consonance with his plaint pleadings, specifically, stating on oath, that he never had any transaction of sale with the defendant. That the defendant was never treated

as prospective purchaser of the suit premises. That he did not receive any amount from the defendant. Since the defendant has denied his title and refused to accept him as landlord of the suit premises, he has forfeited his right of tenancy; if any. The plaintiff, thus, asserted that he is entitled to file suit based on title treating defendant as a trespasser.

11. The plaintiff was cross-examined by defendant at length. At no point of time, it was either put to him or suggested that he was and is a tenant of the suit premises. That he was and is occupying suit premises in the capacity of the tenant. The entire cross-examination was devoted to the alleged agreement to purchase the suit premises and payment of consideration as alleged in his reply dated 11.1.1999. All these suggestions given or made by the defendant were denied by the plaintiff.

12. The defendant also filed his affidavit (Ex.47) in lieu of evidence alleging that he was a tenant of the ground floor premises located in the chawl. That the plaintiff had desired to develop the said chawl. That plaintiff offered to sale premises

having area admeasuring about 1700 sq. ft. on the first floor for consolidated sum of Rs. 5,50,000/-. That is how, defendant in his evidence claimed to be in occupation of the suit premises as a prospective purchaser and not as a tenant. The defendant claimed oral agreement of sale between the parties. Nowhere in the affidavit, tenancy right was either asserted or claimed by the defendant. On the contrary, he has impliedly stated in the affidavit that he was a tenant of the ground floor premises, however, pursuant to the alleged agreement to sale he has shifted to the premises located on the first floor and that is how, he is occupying the same in his own rights. He, thus, asserted that he is not a tenant of the suit premises but owner thereof.

13. The evidence of other witnesses is not relevant for the purposes of deciding the question raised in the memo of appeal and elaborated in the oral submissions.

14. The trial Court with the above rival pleadings and evidence decreed the suit for possession directing money decree

in the sum of Rs. 72,000/- and rejected claim of the defendant that he has a right to possess suit premises as a prospective purchaser thereof.

15. Being aggrieved by the above judgment and decree, appellant has preferred this appeal under section 96 of the CPC to challenge the decree suffered by him.

16. The entire appeal memo and the grounds raised therein, centres around solitary plea that he was and is a tenant of the suit premises protected under the provisions of the Bombay Rent, Hotel & Lodging House Rates (Control) Act, 1947 ('Rent Act' for short). He, thus, could not be branded as trespasser and that Civil Court had no jurisdiction to entertain and try the suit in question, hence impugned judgment and decree is without jurisdiction.

Rival submissions :

17. Shri Borulkar, learned counsel appearing for the appellant, except repeating and reiterating the grounds; as stated in para 16 supra; in the form of oral submissions, did not raise

any other ground to assail the judgment and decree of the trial Court.

18. Shri A. A. Garge, learned counsel appearing for the plaintiff-respondent herein mainly relied upon the findings of the Court below to defeat the submissions made by the learned counsel for the appellant and urged that the appellant cannot be allowed to take summersault and plead altogether a new case which did not go for trial.

Consideration:

19. Having heard rival parties, the defence sought to be raised and canvassed is misplaced. Nowhere in the entire written statement or evidence any attempt was made either to admit title of the landlord-plaintiff or establish tenancy rights vis-a-vis suit premises. Case of the defendant-appellant is that he was a tenant of the ground floor. He shifted to the first floor pursuant to the alleged agreement to purchase 1700 sq. ft. area

for Rs. 5,50,000/- and that he was never a tenant of the premises i.e. first floor of the suit premises.

20. The defendant never raised any counter claim either to claim specific performance of the contract or to protect his possession based on some rights. He did not claim that the agreement to purchase was in black and white; so as to claim the benefit of Section 53A of the Transfer of the Property Act.

21. In my considered view; it is now, too late for the appellant to raise a plea of tenancy for the first time before this court without seeking any amendment to the written statement.

22. The entire defence taken in the memo of appeal and canvassed in the oral submissions is devoid of any substance for the following reasons:-

(a) It was a specific case of the defendant that he was a tenant of the ground floor and not the first floor of the suit premises, whereas first floor is the suit premises. The suit or decree does not relate to ground floor premises.

(b) Having shifted from the ground floor to the first floor premises in part performance of contract (if any), tenancy rights came to an end as per the defence taken by the defendant himself.

(c) No alternate plea was ever raised to claim that the status of the tenant was retained by him while shifting from the ground floor to the first floor; though specific opportunity was given to the defendant by the plaintiff through his notice issued prior to filing of suit claim to claim such right. The defendant did not encash such opportunity.

(d) Lastly, assuming that he was a tenant of the suit premises (which he never claimed); now, he cannot claim that status before this Court for the first time since he had denied relationship of the landlord and tenant. The plaintiff sued him in the Civil Court for possession etc. In the case of **Sultan Vs. Ganesh etc 1980 Rajdhan Law Reporter (NSC) 77 (1988 AIR SC 716)**, the

appellants had denied relationship of landlord and tenant. Suit was filed in the Civil Court. In the written statement, appellants had repeated their denial and claimed ownership. Defendants/appellants, ultimately, failed to prove their contention. The Court found that they were tenant of Mr. Sen (plaintiff's predecessor), however, after this finding, it was held that the appellant could not be allowed to claim protection of Rent Act; since they had not raised this defence in their written statement nor claimed this protection at any time till the impugned decree was passed. There was no plea to amend the written statement to raise the plea sought to be raised and canvassed. The Apex Court did not allow the appellants to claim protection of the Rent Act in view of the denial of the title of the landlord.

23. In the above totality of the facts and circumstances of the case, in view of the law laid down by the Apex Court, this

appeal is devoid of any substance and liable to be dismissed in limine.

24. At this stage, learned counsel for the appellant prayed for stay of this order and consequent execution of the decree for a reasonable period to enable him to take appropriate steps in the matter. In the interest of justice, eight weeks time is granted to vacate the suit premises. In the event of failure to vacate the suit premises the appellant shall be liable to pay use and occupation charges @ Rs. 10,000/- per month until suit premises is vacated. However, appellant shall be entitled to claim adjustment of the amounts, if paid; in the mesne profits enquiry under O. 20 R. 12 of C.P.C.

25. In the result, appeal is dismissed in limine in terms of this order with costs quantified in the sum of Rs. 10,000/- (Rs. Ten Thousand only). R & P be remitted back to the Court below.

(V. C. Daga)
JUDGE